Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States
October Term, 1996

ALFONSO SEPE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS ON THE ISSUE OF WHETHER COLLATERAL ESTOPPEL IS CO-EXTENSIVE WITH THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT WHEN APPLIED IN FEDERAL CRIMINAL CASES AND CLARIFY THE IMPACT OF ITS DECISIONS IN DOWLING V. UNITED STATES AND UNITED STATES V. FELIX ON ASHE V. SWENSON?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings:

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Edward Carhart
William Castro
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OPINION BELOW

The July 12, 1996, opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Shenberg*, 89 F.3d 1461 (11th Cir. 1996). A copy of *Shenberg* is attached hereto as **APPENDIX A.**

JURISDICTION

The opinion of the Eleventh Circuit in *Shenberg* was filed on July 12, 1996. The Eleventh Circuit denied rehearing on September 25, 1996. *See* **APPENDIX B.** This petition for a writ of certiorari follows within 90 days of the latter date. *See* Supreme Court Rules, Rule 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. CONST., AMEND. V.

STATEMENT OF THE CASE

A. Procedural History

On September 24, 1991, the government returned a 104-count indictment against the Petitioner, Dade County Circuit Court Judge Alfonso Sepe, and three co-defendants, County Court Judge Harvey Shenberg, Circuit Court Judge Philip Davis and attorney David Goodhart. (R1-1.) Counts 1 and 2 charged the defendants with conspiring to violate and with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq*. The remaining counts charged the defendants with various related acts of extortion, mail fraud and money laundering. The RICO charges alleged the existence of 13 "racketeering acts," all of which, in turn, were divided into numerous sub-parts, charging various combinations of extortion, bribery, unlawful compensation and money laundering.

The defendants were tried between September 21, 1992 and April 26, 1993. At the close of the government's case, the district court dismissed Counts 100, 102 and 106 against Goodhart and Sepe. (R102-8817, 8832.)

The jury deliberated more than a month before reaching a verdict on April 26, 1993. The jury failed to convict Sepe of any count. The jury acquitted Sepe of 28 counts and reached

no verdict as to 5 counts, including the RICO counts.[1] Thereafter, the court dismissed one of the five hung counts. The following chart summarizes the end result of the verdict and court rulings as to Sepe.

COUNT	DESCRIPTION	VERDICT
1	RICO CONSPIRACY	HUNG
2	RICO	HUNG
ACT 1	Massey giving money to Sepe	BLANK
1a	Extortion (Count 103)	
1b	Bribery	
1c	Unlawful compensation	
ACT 2	Massey paying Sepe's bills	BLANK
2a	Extortion (Count 104)	
2b	Bribery	
2c	Unlawful Compensation	
ACT 5	Sepe's Christmas Party at Bruns' Exec. Club	BLANK
5a	Extortion (Count 89)	
5b	Bribery	
5c	Unlawful Compensation	
ACT 9	Sepe agreeing to fix the Perdonio case	BLANK
9a	Conspiracy to Extort (Count 95)	
9b	Extortion (Count 96)	
9c	Unlawful Compensation	
ACT 10	Receipt of $150,000 (Carrillo)	BLANK
10a	Extortion (COUNT 97)	
10b	Bribery	

[1] Davis was acquitted of all counts. Shenberg and Goodhart were convicted of some counts and acquitted of some counts. Shenberg and Goodhart have filed a separate petition for a writ of certiorari challenging their convictions.

10c	Unlawful compensation	
10d	Money Laundering (COUNT 98)	
10f	Money Laundering (COUNT 100)	
10g	Money Laundering (COUNT 101)	
10h	Money Laundering (Count 102)	
ACT 11	Attempted Receipt of $150,000 (Penna)	BLANK
11a	Conspiracy to commit extortion (COUNT 103)	
11b	Attempted extortion (COUNT 104)	
11c	Bribery	
11d	Unlawful compensation	
3	Extortion (from bondsman Tiseo)	HUNG
4	Extortion (Massey paying Sepe's bills)	NOT GUILTY
61-80	Mail Fraud (Massey paying Sepe's bills)	NOT GUILTY
89	Extortion (Sepe's Christmas Party)	NOT GUILTY
95	Conspiracy To Extort (Perdonio)	NOT GUILTY
96	Extortion (Perdonio Case)	NOT GUILTY
97	Attempted extortion of $150,000	NOT GUILTY
98	Money laundering of $150,000	NOT GUILTY
99	Money laundering (Southeast Bank)	NOT GUILTY
100	Money laundering re Buccione's	DISMISSED
101	Money laundering	NOT GUILTY
102	Money laundering	DISMISSED
103	Conspiracy to extort $150,000	HUNG
104	Attempted extortion of $150,000	DISMISSED

On June 7, 1993, Sepe moved, pursuant to the doctrines of direct and collateral estoppel, to bar the government from relying upon any of the crimes for which he had been acquitted in any retrial of the hung RICO charges. (R19-952, 955-57.) On July 15, 1993, the district court granted the motion. *United States v. Shenberg*, 828 F. Supp. 968, 971 (S.D. Fla. 1993). Based on a line of Fifth and Eleventh Circuit cases culminating in *United States v. Gornto*, 792 F.2d 1029 (11th Cir. 1986), the district court ruled that the government was estopped in a retrial of Count 1 (RICO conspiracy) and Count 2 (substantive RICO) from relying upon the racketeering acts which paralleled the dismissed or acquitted counts. *Shenberg*, 828 F. Supp. at 970-71.

The government appealed the district court's estoppel ruling to the Eleventh Circuit in Appeal No. 93-4906. The Eleventh Circuit subsequently consolidated the government's appeal with the appeals filed by Goodhart and Shenberg from their convictions (Appeal No. 93-4798.)

B. Statement of the Facts

For purposes of this Petition only, Sepe adopts the "Fact" section of the Eleventh Circuit's decision in *United States v. Shenberg*, 89 F.3d 1461 (11th Cir. 1996). *See* **APPENDIX A.**

C. The Eleventh Circuit's Decision

The Eleventh Circuit in *Shenberg* agreed with Sepe that estoppel barred the use of acquitted conduct to prove the *substantive* RICO charge. However, the Eleventh Circuit reversed the portion of the district court's order which barred the government from using the acquitted conduct in the retrial of the RICO *conspiracy* charge. The Eleventh Circuit ruled that this Court's decisions in *Dowling v. United States*, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990), and *United States v. Felix*, 503 U.S. 378, 112 S.Ct. 1377, 1385, 118 L.Ed.2d 25 (1992), overruled *sub silentio* the Fifth and Eleventh Circuit decisions relied upon by Sepe. *Shenberg*, 89 F.3d at 1479-81.

REASON FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF COLLATERAL ESTOPPEL IN CRIMINAL CASES.

A. The Doctrine of Issue Preclusion

The doctrine of issue preclusion bars relitigation of "an issue of fact ... actually litigated and determined by a valid and final judgment ... between the parties, whether on the same or a different claim ..." where "... the determination is essential to the judgment." *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Stated another way, once an issue essential to a final and valid judgment is litigated and decided between

parties, issue preclusion forecloses relitigation of the issue between the same parties on the same essential element in a subsequent proceeding, whether on the same or a different claim. *United States v. Mendoza*, 464 U.S. 154, 158, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984). The doctrine serves "... the purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy ... of promoting judicial economy by preventing needless litigation," *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), and of "... [fostering] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

Issue preclusion, although more frequently developed in civil cases, stems from a common law doctrine which applied in *both* civil and criminal cases. *See* Note: *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1730 & n. 7 (1995) (citations omitted).[2] The Court first applied the doctrine to bar a criminal prosecution in the United States in 1916. *See United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916). *See also Sealfon v. United States*, 332 U.S. 575, 578-79, 68 S.Ct. 237, 92 L.Ed.2d 180 (1948). In 1970, the Court held that the Fifth Amendment guarantee against

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[2] The author of this law review article traces criminal collateral estoppel back to the 17th century decisions by British courts.

double jeopardy embodied the doctrine. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

Central to issue preclusion are two questions: (1) What facts were necessarily determined in the first proceeding on an essential element of a valid and final judgment? and (2) Is a party in a subsequent proceeding attempting to relitigate the facts established against it on the same essential element in the second proceeding? *Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194.

These inquiries present particular problems in criminal cases due to the nature of general verdicts. When an acquittal results from a general verdict, the facts resolved between the parties are not necessarily apparent. The question of what facts have been resolved must be addressed by "'[examining] the record of a prior proceeding, taking into account, the pleadings, evidence, charge, and other relevant matter ... [Thereafter, the court must] conclude whether a rational [trier of fact] could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Ashe*, 397 U.S. at 444, 90 S.Ct. at 1194 (citation omitted). Realism and rationality define the analysis -- not "the hypertechnical and archaic approach of a 19th century pleading book." *Ashe*, 397 U.S. at 444, 90 S.Ct. at 1194. Thus, "[t]he inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Ashe*, 397 U.S. at 444, 90 S.Ct. at 1194 (citation omitted). The analysis begins with the assumption that the trier of fact acted rationally and decided certain

facts in reaching its decision. *United States v. Jenkins*, 902 F.2d 459, 463 (6th Cir. 1990).

Issue preclusion, thus, operates differently from traditional double jeopardy concepts. Double jeopardy requires a comparison of *statutory elements* to determine the similarity of offenses. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). If the elements are identical, double jeopardy bars further prosecution, regardless of the facts used to prove them. *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.E.2d 556 (1993). Since conspiracies and substantive offenses have different elements, if a defendant is acquitted of a substantive offense, the Double Jeopardy Clause does not bar a subsequent trial for conspiracy to commit that offense. *United States v. Felix*, 503 U.S. 378, 112 S.Ct. 1377, 1385, 118 L.Ed.2d 25 (1992).

B. The Eleventh Circuit's Flawed Reasoning

The Eleventh Circuit's ruling in *Shenberg* effectively eliminated the doctrine of collateral estoppel in criminal cases by making it co-extensive with the Double Jeopardy Clause of the Fifth Amendment. The court reasoned that since collateral estoppel had its roots in the Double Jeopardy Clause, it necessarily was limited by the terms of that Clause. *Shenberg*, 89 F.3d at 1479-81. Hence, if the Double Jeopardy Clause did not bar a defendant's retrial for conspiracy, following his acquittal on a substantive offense, then collateral estoppel also did not apply in this context. *Shenberg*, 89 F.3d at 1479.

However, issue preclusion does not derive *solely* from the Double Jeopardy Clause. Rather, issue preclusion constitutes a judicially-developed, common-law doctrine fully applicable to federal criminal cases without reference to traditional double jeopardy concepts. As this Court stated in *Ashe*:

> ... [Issue preclusion has been an established rule of federal criminal law at least since ... 50 years ago ... As a rule of federal law, therefore, "[i]t is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case..."
>
> * * *
>
> As the number of statutory offenses multiplied the potential for unfair and abusive reprosecutions became more pronounced. The federal courts soon recognized the need to prevent such abuses through the doctrine of [issue preclusion], and it became a safeguard firmly embedded in federal law. Whether its basis was a constitutional one was a question of no more than academic concern until this Court's decision in *Benton v. Maryland*, [which applied the double jeopardy clause to the states].

Ashe, 397 U.S. at 443, 445 & n. 10, 90 S.Ct. at 1194-95 & n. 10, (citations omitted.) For purposes of application to the *states*, the Double Jeopardy Clause was deemed to "embod[y]" the doctrine of issue preclusion. *Ashe*, 397 U.S. at 445, 90 S.Ct. at 1195. However, the Double Jeopardy Clause does not restrict the application of the doctrine in *federal* cases.

In *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the Court clearly recognized the added dimensions issue preclusion provided to traditional concepts of double jeopardy. Thus, the Court stated:

> The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first....
>
> Because we conclude today that a lesser included and a greater offense are the same under Blockburger, we need not decide whether repetition of proof required by the successive prosecutions against [defendant] would otherwise entitle him to *the additional protection* offered by [issue preclusion].

Brown, 432 U.S. at 166 n. 6, 97 S.Ct. at 2226 n. 6.

Recognizing the fundamental differences between the element-directed Double Jeopardy analysis and the fact-directed estoppel analysis, courts have long applied collateral estoppel to bar retrials even where the elements of the offenses in question did not match.

For example, in *United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979), *modified on reh.*, 611 F.2d 585 (5th Cir. 1980), *cert. denied*, 446 U.S. 939, 100 S.Ct. 2160, 64 L.Ed.2d 793

(1981), the defendant was charged with a conspiracy to commit five crimes under 18 U.S.C. § 371. Two of those crimes were also charged as separate counts. The defendant was acquitted of the substantive counts but the jury hung on the conspiracy charge. Larkin moved to dismiss the conspiracy charge, arguing that collateral estoppel barred the government from proving the conspiracy using the allegation that he had agreed to commit the two crimes for which he had been acquitted. The district court denied the motion and Larkin took an interlocutory appeal to the Fifth Circuit. 605 F.2d at 1363 & n. 10. The Fifth Circuit agreed with Larkin that the jury's acquittal of the substantive counts necessarily determined, under the circumstances of the case, that he did not commit the two crimes for which he had been acquitted. *Id.* at 1371. Accordingly, the Fifth Circuit permitted reprosecution of the conspiracy charge only upon a basis *other than* that Larkin agreed to commit those offenses. *Larkin*, 611 F.2d at 586.

Prior to the instant case, the Eleventh Circuit followed *Larkin*. Thus, in *United States v. Gornto*, 792 F.2d 1028 (11th Cir. 1986), the defendant was acquitted of two substantive drug possession charges in a first trial. However, the jury hung as to two conspiracy charges. In a retrial of the hung counts, the defendant was convicted of one of the two conspiracy charges. On appeal, the defendant argued that the district court erred in refusing to bar testimony from one of the government's witnesses that he was involved in the drug transactions at issue in the acquitted counts. 792 F.2d at 1030. The Eleventh Circuit

agreed and held that, under the circumstances, the district court should have barred the testimony. The court correctly cited the proper estoppel standard set forth in *Ashe*, which required the Court to examine the verdict and record to see "what facts" if any "were necessarily determined in the first law suit." *Gornto*, 792 F.2d at 1031. The court examined the record and concluded that the jury's acquittal on the substantive charges "meant that they disbelieved" a key witness, Carver, about Gornto's alleged activities. *Id.* at 1031. Accordingly, the Court barred the government from introducing that same rejected version of the events at the retrial. *Id.* at 1031-32. *Accord United States v. Corley*, 824 F.2d 931 (11th Cir. 1987) (jury's acquittal of substantive count barred use of those facts as overt acts in retrial of hung conspiracy count); *United States v. Whitaker*, 702 F.2d 901 (11th Cir. 1983) (affirming district court's suppression of evidence in defendant's second trial on collateral estoppel grounds, agreeing that "no rational jury could have believed any" of the testimony of one government witness "while acquitting Whitaker" on count II).

C. The Split In the Circuits

The Eleventh Circuits' decision in *Shenberg* has created a split in the circuits concerning the application of collateral estoppel in federal criminal cases. In *Shenberg*, the Eleventh Circuit ruled that *Gronto* (and, by implication *Corley*, *Whittaker* and *Larkin*) were all overruled by this Court's decisions in *Dowling v. United States*, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990), and *United States v. Felix*, 503 U.S. 378, 112

S.Ct. 1377, 1385, 118 L.Ed.2d 25 (1992). The Eleventh Circuit's reasoning, however, does not withstand analysis and conflicts with both *Ashe* and several other Circuits.

In *Dowling*, the Court merely held that traditional principles of collateral estoppel did not bar the government from introducing evidence of acquitted conduct in a subsequent trial under Fed. R. Evid. 404(b). The Court in *Dowling* reaffirmed *Ashe* but distinguished its holding for two reasons. *First*, the Court reasoned that the Rule 404(b) evidence was being introduced for a purpose *other than* to establish an "ultimate issue" in the subsequent prosecution." *Dowling*, 493 U.S. at 348-51. *Second*, under *Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988), the government was free to introduce Rule 404(b) evidence based upon "a lower standard of proof" than was utilized by the jury that acquitted Dowling. *Dowling*, 493 U.S. at 349 (citations omitted).

Dowling expressly did not alter *any* existing rules governing collateral estoppel generally. *Id.* at 350-51 (citations omitted). It did not discuss or imply any distinction between conspiracy and substantive offenses. And, it did not purport to "overrule" any Fifth or Eleventh Circuit precedents.

The Eleventh Circuit in *Shenberg* confused the standards a trial judge uses to *admit evidence* with the standards a jury uses to *determine issues*. Under the Eleventh Circuit's view, evidence can never be precluded by an acquittal in first trial, because all trial evidence is admitted pursuant to Fed. R. Evid.

401 or Fed. R. Evid. 801(d)(2)(E) under the "preponderance of the evidence" standard. *See Shenberg*, 89 F.3d at 1480 & n. 23. If *Dowling* could be read to mean that, *Dowling* would have completely overruled *Ashe* and eliminated the doctrine of collateral estoppel -- a contention not even the government made. Questions of admissibility determine the competency and relevancy of evidence. Fed. R. Evid. 104(a) and (b). If evidentiary standards are satisfied, evidence is provided to trier of fact which then must resolve the ultimate issues in the case based upon the applicable burden of proof -- beyond a reasonable doubt in criminal cases. That evidence meets general conditions of evidentiary admissibility does not answer whether that same evidence has been litigated and determined by the trier of fact between the parties on an issue essential to two proceedings involving the same parties. It is the latter analysis on which issue preclusion focuses. Here, evidence of acquitted and dismissed extortion, mail fraud and money laundering conduct in a retrial would address the same essential elements of the RICO conspiracy charge as in the first trial -- the "pattern of racketeering activity." Therefore, issue preclusion forecloses the use of the evidence.

Under *United States v. Carter*, 721 F.2d 1514 (11th Cir.), *cert. denied*, 469 U.S. 819, 105 S.Ct. 89, 83 L.Ed.2d 36 (1984), and its progeny, to prove the crime of RICO conspiracy at issue in Count 1 of the indictment in this case, the government was required to prove that Sepe agreed "that two predicate acts [would] be committed." *Carter*, 721 F.2d at 1528. Consistent

with this fact, the district court -- *at the government's own request* -- instructed the jury that it had to find "beyond a reasonable doubt" that Sepe committed or agreed to commit at least two racketeering acts. Since the two predicate act requirement was an essential element of the RICO conspiracy charge, the government was required to prove it beyond a reasonable doubt and not, like the Rule 404(b) evidence at issue in *Dowling*, by "a lower standard of proof." Under these circumstances, the acquittals and dismissals of the predicate acts in Sepe's first trial, unlike *Dowling*, determined the same essential element/ultimate issue of a retrial -- the commission of and the agreement to commit the predicate acts. For this reason, *Dowling* is inapposite to this case and did not alter existing collateral estoppel precedents.

To be sure, as previously noted, from a classic *double jeopardy* standpoint, an acquittal (or a conviction) of a substantive offense does not bar a subsequent prosecution for conspiring to commit that same offense, because the elements of substantive and conspiracy offenses are different. *United States v. Felix*, 503 U.S. 378, 112 S.Ct. 1377, 1385, 118 L.Ed.2d 25 (1992). That rule, however, existed -- even in the Eleventh Circuit -- at the time *Gornto* and *Corley* were decided. *See United States v. DeMarco*, 791 F.2d 833, 836 (11th Cir. 1986) (citations omitted). Double Jeopary and collateral estoppel, although both grounded in the Fifth Amendment, look to different factors. Double Jeopardy looks to the *statutory elements* of

the charged offenses; collateral estoppel looks to the *factual basis* of the jury's verdict. *See* Section I(A) *supra*.[3]

The Eleventh Circuit in *Shenberg*, however, read *Dowling* and *Felix* together as conflating issue preclusion with double jeopardy protection. *Shenberg*, 89 F.3d at 1479-81. Although the Eleventh Circuit did not say so, this view relegates *Ashe* to oblivion. Issues or facts would never be precluded unless the entire prosecution was barred. The Eleventh Circuit's reading of *Dowling* and *Felix* also ignores *Dowling*'s reaffirmation of *Ashe* and creates an intercircuit.

For example, in *United States v. Seley*, 957 F.2d 717, 721-22 (9th Cir. 1992), the Ninth Circuit held that a jury's acquittal of substantive counts estopped a retrial of a hung conspiracy charge, expressly relying upon the Eleventh Circuit's decision in *Corley*. Similarly, in *United States v. Bailin*, 977 F.2d 270, 276-77 (7th Cir. 1992), the Seventh Circuit rejected the government's argument that *Felix* altered the application of collateral estoppel. "Despite the inapplicability of double jeopardy, issue preclusion may nevertheless bar the subsequent prosecution if an acquittal on the substantive crime necessarily established issues which are essential to a finding that the defendant

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[3] Moreover, the distinction between conspiracy and substantive offenses in this case is illusive, given the nature of the predicate acts in RICO. Three of dismissed or acquitted counts upon which Sepe based his estoppel request -- Counts 95, 97 and 104 -- were *themselves* inchoate conspiracy or attempt offenses. *See* Chart, at p. 4 *supra*.

entered into the alleged agreement." 977 F.2d at 276 n. 6 (citing *Seley* with approval).[4] *Cf. Rossetti v. Curran*, 80 F.3d 1, 6 (1st Cir. 1996) (noting that "[j]ust how the Supreme Court would apply *Dowling* in a slightly different context is a matter that could at least be debated").

The Eleventh Circuit's decision in *Shenberg* also squarely conflicts with the Fifth Circuit's decision in *Larkin*. *See* pp. 11-12 *supra*. *See also United States v. Mock*, 604 F.2d 341, 344-46 (5th Cir. 1979) (barring reintroduction of evidence of participation in a conspiracy after acquittal on conspiracy charges). And, *Shenberg* conflicts with the Second Circuit's decisions in *United States v. Kramer*, 289 F.2d 909, 913-20 (2d Cir. 1961) (barring evidence of substantive offenses in a subsequent conspiracy trial), and *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979) (same).

On the other hand, the First and Third Circuits have reached decisions consistent with that in *Shenberg*. *See United States v. Salamone*, 902 F.2d 237, 240-41 (3d Cir. 1990) (permitting reintroduction of evidence from a previous conspiracy trial in light of *Dowling*), *cert. denied*, 498 U.S. 1030, 111 S.Ct. 685, 111 L.Ed.2d 245 (1991); *United States v. Dray*, 901 F.2d 1132, 1135-41 (1st Cir.) (admitting evidence after *Dowling* of substan-

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[4] The *Bailin* court, however, did not apply this reasoning to a RICO conspiracy charge, since the issue was not raised by the parties. *Bailin*, 977 F.2d at 283 n. 20.

tive offenses in a subsequent conspiracy trial), *cert. denied*, 498 U.S. 895, 111 S.Ct. 245, 112 L.Ed.2d 204 (1990).

Due to the growing split in the circuits and the frequency of partial verdicts, hung jury mistrials and retrials occur, the issue is ripe for resolution by the Court.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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APPENDIX

United States of America,

Plaintiff-Appellee-Cross-Appellant,

v.

Harvey N. Shenberg,

Defendant-Appellant-Cross-Appellee,

David Goodhart,

Defendant-Appellant.

United States of America,

Plaintiff-Appellant,

v.

Harvey N. Shenberg, Alfonso C. Sepe,

Defendants-Appellees.

Nos. 93-4798, 93-4906.

United States Court of Appeals,
Eleventh Circuit.

July 12, 1996

Circuit court judge and a lawyer were convicted in the United States District Court for the Southern District of Florida, No. 91-708-CR-JAG, Jose A. Gonzalez, Jr., J., of conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO), and judge was also convicted of attempted extortion. Defendants appealed and government cross-appealed sentences and

district court's ruling barring reprosecution on acquitted counts. The Court of appeals, Hatchett, Circuit Judge, held that: (1) evidence was sufficient to support RICO conspiracy convictions; (2) district court acted within its discretion in denying defendants' request for special verdict on RICO conspiracy count; (3) district court acted within its discretion when it failed to replace pregnant juror after dismissing her for cause during deliberations; (4) juror's presentation to court security officer of cocaine-laced bag she found in jury bathroom was not a "communication" that court was required to disclose; (5) district court, in sentencing defendant judge, erred in applying two-point enhancement for "more than minimal planning"; (6) district court, in sentencing defendant lawyer, properly applied special skill enhancement; (7) collateral estoppel applied to bar use of acquitted counts as predicate acts in substantive RICO counts in retrial on mistried counts; but (8) collateral estoppel did not bar government from using predicate acts that mirrored acquitted substantive counts to prove RICO conspiracy.

Convictions affirmed and resentencing ordered.

1. Criminal Law

Court of Appeals reviews sufficiency of evidence claims in light most favorable to government, drawing all reasoning inferences and credibility choices in favor of jury's verdict.

2. Criminal Law

If reasonable person could find that evidence establishes guilt beyond reasonable doubt, jury's verdict must stand.

3. Criminal Law

Acquittal of defendants and other codefendants on other counts alleging similar or related conduct was irrelevant to issue of whether sufficient evidence supported defendants' convictions of conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO); seemingly inconsistent verdicts could have easily been result of mistake or lenity by jury in acquittal as they could have been proof of lack of evidence to support conviction.

4. Conspiracy

To establish conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO), government must prove that defendant objectively manifested, through words or actions, agreement to participate in conduct of affairs of enterprise. 18 U.S.C.A. § 1962(d).

5. Conspiracy

Government can prove existence of agreement, as required to support conviction of conspiracy to violate Racketeer Influenced and Corrupt Organizations Acts (RICO), by proving either that defendant agreed to overall objective of conspiracy, or that

defendant personally committed two predicate acts, thereby participating in a single objective conspiracy. 18 U.S.C.A. § 1962(d).

6. Conspiracy

To prove that defendant agreed to overall objective of conspiracy, as would support proof of conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO), government can use circumstantial evidence to show that each defendant must necessarily have known that others were also conspiring to participate in same enterprise through pattern of racketeering activity. 18 U.S.C.A. § 1962(d).

7. Conspiracy

Finding that circuit court judge agreed to corruptly utilize circuit court system, in conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO), was supported by evidence of defendant's participation with another judge in acceptance of kickbacks on court appointments, defendant's counseling of other judge on how to conduct illegal transactions, defendant's disclosure of confidential informant's name and defendant's holding, concealing and disbursing of proceeds derived from court appointments and case fixing. 18 U.S.C.A. §1962(d).

8. Conspiracy

Finding that lawyer agreed to overall objective of conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) by corruptly utilizing circuit court system was supported by evidence that defendant agreed to act as bag man for circuit judge, that defendant arranged with that judge to fix case, that defendant agreed to arrange and arranged with judge to fix another case, and that defendant attempted to bribe another judge. 18 U.S.C.A. § 1962(d).

9. Conspiracy

To sustain conviction for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) based upon commission of two predicate acts, government must show that predicate acts are related and amount to or pose threat of continued criminal activity. 18 U.S.C.A. § 1962(d).

10. Conspiracy

Lawyer's six-month involvement in case fixing posed threat of continued criminal activity sufficient to support his conviction for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1962(d).

11. Criminal Law

District Court's denial of request of special verdict is reviewed for abuse of discretion.

12. Criminal Law

District court's use of general verdict for multi-object conspiracy, though disfavored, does not violate defendant's Sixth Amendment rights; nor does district court's refusal to require special verdict provide independent basis for reversing otherwise valid conviction. U.S.C.A. Cons.Amend.6.

13. Criminal Law

District court acted within its discretion in denying defendants' request for special verdict on count charging conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO), where court properly instructed jury on elements of RICO conspiracy violation and there was no evidence that jury failed to adhere to district court's instructions. 18 U.S.C.A. § 1962(d).

14. Criminal Law

Court of Appeals presumes that jury follows trial court's instructions.

15. Criminal Law

District court's decision to continue deliberations with 11-member jury is reviewed for abuse of discretion. Fed.Rules Cr.Proc. Rule 23(b), 18 U.S.C.A.

16. Jury

District court acted within its discretion when it failed to replace pregnant juror after dismissing her for cause during deliberations, where jury had deliberated for a month prior to juror's dismissal. Fed.Rules Cr.Proc.Rule 23(b), 18 U.S.C.A.

17. Criminal Law

Juror's presentation to court security officer of cocaine-laced bag she found injury bathroom was not a "communication" that court was required to disclose, where juror presented bag without comment on its effects on her ability to deliberate, but even if it was, court's failure to respond, for fear that appearance of suspicion concerning integrity of any juror would not serve interest of justice, was harmless. Fed.Rules Cr.Proc.Rule 23(a), 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

18. Criminal Law

Sentencing court's findings of fact are reviewed for clear error, and court's application of those facts to Sentencing Guidelines is reviewed de novo. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

19. Criminal Law

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) and extortion induced under color of official right, district court properly applied cross referencing provision and borrowed applicable guidelines for conviction for conspiracy to commit murder, finding that, in government sting operation in which government created fictitious confidential informant and drug trafficker, judge disclosed confidential informant's name for payment with knowledge that trafficker intended to murder informant and that judge participated in planning of the murder in requiring that murder not occur for at least 45 days. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. § 2C1.1(c)(1), 18 U.S.C.A.

20. Criminal Law

Sentencing Guidelines are given their plain meaning effect, except in most extraordinary situation where language leads to absurd result contrary to clear legislative intent. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

21. Criminal Law

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) and extortion induced under color of official right, district court properly applied "vulnerable victim" enhancement, despite fact that

confidential informant who was victim of alleged murder conspiracy was fictitious, where judge disclosed informant's name in exchange for payment, knowing that state requested that his name remain under seal and knew that drug trafficker, who was also fiction created by government, intended to murder informant. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. § 3A1.1, 18 U.S.C.A.

22. Criminal Law

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) and extortion induced under color of official right, "more than minimal planning' enhancement could not apply, where victim was fictitious; Sentencing Guideline required an actual assault. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. § 2A2.1(b)(1), 18 U.S.C.A.

23. Criminal Law

When reviewing whether district court properly departed from Sentencing Guidelines, Court of Appeals first determines whether Sentencing Commission adequately considered particular factors district court relied on for basis of its departure; then, assuming the Sentencing Commission did not adequately consider the factors, court determines whether district court's reliance on those factors furthers objective of the guidelines; and finally, if those factors further objectives of guidelines, court determines reasonableness of district court's departure. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

24. Conspiracy

Extortion and Threats

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) and extortion induced under color of official right, district court properly departed upward five levels based upon court's finding that judge's conduct was part of systematic corruption of governmental function causing loss of public confidence in government; Sentencing Commission did not adequately account for systematic corruption resulting in loss of public confidence in government, district court's reliance on this factor furthered objectives of guidelines, and amount of departure was reasonable. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. § 2C1.1, comment. (n.5), 18 U.S.C.A.

25. Criminal Law

For purposes of sentencing guidelines, government must prove facts "used" in sentencing by preponderance of evidence. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

26. Criminal Law

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act 9RICO), and extortion induced under color of official right, district court could

take judicial notice of public reaction to case and consider it in making its decision to depart from Sentencing Guidelines. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.; Fed.Rules Evid.Rule 201, 28 U.S.C.A.

27. Criminal Law

District courts may not enhance sentence on basis of same incidents that they used to determine base level for sentencing.

28. Criminal Law

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act 9RICO) and extortion induced under color of official right, no double counting occurred when district court applied two point enhancement for abuse of position of trust and departed upward five levels based on finding that judge's conduct was part of systematic corruption of governmental function causing loss of public confidence in government; court did not base its decision to depart on same considerations that motivated its application of abuse of position of trust enhancement. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. §3B1.3, 18 U.S.C.A.

29. Criminal Law

Sentence enhancement based on special skill is reviewed for clear error. U.S.S.G. § 3B1.3, 18 U.S.C.A.

30. Criminal Law

In sentencing lawyer for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) for fixing drug case, district court properly added two-point enhancement for use of special skill, based on finding that, as part of conspiracy, defendant read arrest affidavits, reviewed pleadings, proposed suppression orders, and made suggestions based on his experience and education as to amount of bond, booking procedure and possibility of appeal of suppression order. 18 U.S.C.A. § 1962(d); U.S.S.G. § 3B1.3, 18 U.S.C.A.

31. Criminal Law

District court properly sentenced defendant under 1989, rather than 1990, Sentencing Guidelines, finding that defendant's participation in conspiracy ended in July 1990. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

32. Criminal Law

Court of Appeals reviews questions of law de novo.

33. Double Jeopardy

Double jeopardy clause of Fifth Amendment does not apply in context of retrial of mistried counts, since retrial is continuation of original jeopardy. U.S.C.A. Const.Amend. 5.

34. Judgment

Although double jeopardy does not bar government from reprosecuting defendants on mistried counts, estoppel principles may nevertheless apply to preclude government from relitigating certain issues on retrial. U.S.C.A. Const. Amend. 5.

35. Double Jeopardy

Double Jeopardy clause does not limit application of collateral estoppel to only cases in which double jeopardy applies. U.S.C.A. Const.Amend. 5.

36. Judgment

Doctrine of collateral estoppel applies when issue of ultimate fact has once been determined by valid and final judgment; in such instances, same parties cannot relitigate ultimate issue in any further lawsuit.

37. Judgment

When determining whether collateral estoppel applies in context of retrial, court must first examine verdict and record to see what facts, if any, were necessarily determined in acquittal at first trial, and then court must determine whether previously determined facts constituted essential element of mistried count.

38. Judgment

Direct estoppel barred government from using acquitted counts as predicate acts in substantive racketeer Influenced and corrupt Organizations Act (RICO) count during retrial on mistried counts, where most of the crimes defendants were charged with mirrored predicate acts listed in the substantive RICO count, so that acquitted counts necessitated finding that jury also decided predicates acts which mirrored acquitted counts in defendants' favor in first trial. 18 U.S.C.A. § 1962.

39. Judgment

Collateral estoppel did not preclude government from introducing evidence if offered to support acquitted counts as predicate acts in Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy count; although predicate acts in RICO conspiracy count mirrored crimes charged in indictment, acquitted counts did not necessitate finding that ultimate issue of fact, i.e., agreement to commit two or more predicate acts or agreement to overall objective of enterprise, was necessarily determined. 18 U.S.C.A. § 1962(d).

40. Conspiracy

Actual commission of underlying crime does not constitute essential element of Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy. 18 U.S.C.A. § 1962(d).

G. Richard Strafer, Quinon & Strafer, P.A., Miami, FL, for Shenberg in No. 93-4798.

James Jay Hogan, Miami, FL, for Goodhart in No. 93-4798.

William A. Keefer, Jr., U.S. Attorney, John O'Sullivan, Anne Ruth Schultz, Linda Collins Hertz, Lawrence D. Levecchio, Dennis R. Bedard, Asst. U.S. Attys., Miami, FL, for the U.S. in No. 93-4798.

Anne R. Schultz, Asst. U.S. Atty., Kendall Coffey, U.S. Attorney, Linda Collins Hertz, Lawrence D. Levecchio, Dennis R. Bedard, Asst. U.S. Attys., Miami, FL, for the U.S. in No. 93-4906.

Richard Strafer, Quinon & Strafer, P.A., Miami, FL, for Shenberg & Sepe in No. 93-4906.

Appeals from the United States District Court for the Southern District of Florida.

Before HATCHETT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In these "Operation Court Broom" appeals, we affirm the convictions and order resentencing of one of the appellants. The

facts that follow are either undisputed or represent factual inferences that the jury was entitled to draw.

FACTS

In November 1988, the citizens of Dade County, Florida, elected judicial candidate Roy T. Gelber to the Circuit Court of the Eleventh Judicial Circuit of Florida. Gelber, prior to taking office, arranged with his former law partner, Stephen Glass, to appoint Glass as special assistant public defender (SAPD). In return for SAPD appointments, Glass agreed to give Gelber one-third of the fees received.[1] Gelber made similar kickback arrangements with other lawyers in Miami while in office.[2] Also in 1988, Gelber became close friends with Dade County Court judicial candidate Harvey N. Shenberg. Shenberg, so also won his bid for election, advised Gelber regarding the acceptance of kickbacks and other illegal schemes. During one of Shenberg's conversations with Gelber, Shenberg suggested that Gelber add one of Shenberg's former law partners, Manny Casabielle, to the court appointment

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[1] As a circuit judge in the criminal division, Gelber had authority to appoint private attorneys as SAPDs to represent indigent defendants when a conflict of interest arose with the Public Defender's Office. Gelber, however, never received any kickbacks from the Glass appointments.

[2] Miami attorneys William Castro, Kent Wheeler, Arthur Luongo, Randolph Ferguson, Harry Boehme, and Nancy Lechtner all paid Gelber twenty to twenty-five percent of the SAPD fees they received.

list in exchange for kickbacks of twenty-five percent. Gelber agreed. Thereafter, Shenberg periodically gave Gelber money in amounts ranging from $500 to $1,200 on Casabielle's behalf. Oftentimes, Gelber directed Shenberg to hold the money for safekeeping. During this same time period, Circuit Judge Alfonso C. Sepe talked with Gelber about appointing Arthur Massey, a private lawyer, as SAPD. Gelber appointed Massey in two cases for which Massey paid Gelber $1,000 in cash. Gelber eventually grew concerned that his repeated appointments of the same lawyers would raise suspicion; thus, in an attempt to avoid detection, Judge Sepe began appointing lawyers from Gelber's court appointment list.

State and federal officials (the government) eventually learned of the kickback scheme, and in 1989, the government launched a sting operation called "Operation Court Broom" to investigate corruption in the Circuit Court of Dade County. The government employed Raymond Takiff, a lawyer and a longtime friend of Gelber, to work undercover and tape-record telephone conversations and meetings with Gelber and others suspected of corruption. In August 1989, Takiff, posing as a corrupt lawyer with ties to a fictitious South American drug trafficker named "Peter," approached Gelber requesting Gelber's assistance in influencing criminal cases pending against Peter's employees. Gelber accepted $11,000 from Takiff and gave Shenberg $5,000 of the money to place in Shenberg's home safe. The next month, Takiff asked Gelber to investigate whether Peter's employee, Jose Angel Rapard, cooperated with authorities in exchange for the

dismissal of an attempted murder charge pending against him. During their meeting, Takiff disclosed to Gelber that Peter believed that Rapard informed the police of a pending cocaine deal in exchange for the dismissal of the charge. Gelber and Shenberg, after reviewing Rapard's court file, agreed that the circuit judge handling the case dismissed it after the victim failed to appear. Gelber subsequently reported to Takiff that the circuit judge dismissed the attempted murder charges against Rapard for legitimate reasons.

Several months later, in March 1990, Takiff informed Gelber that the police searched one of Peter's employee's hotel room pursuant to a warrant Gelber signed.[3] Takiff told Gelber that Peter wanted the $143,000 in cash and jewelry seized in the search returned and information regarding the identity of the confidential informant. Gelber initially told Takiff that he could not assist him because he placed the warrant affidavit under seal. Gelber, however, subsequently agreed to hear Takiff's motion to return property and unseal the affidavit. After Gelber's meeting with Takiff, Gelber discussed Takiff's latest request with Shenberg. Gelber told Shenberg that he intended to receive a portion of the

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[3] As part of the undercover sting operation, officers presented Gelber with a fictitious search warrant affidavit seeking authorization to search a motel room for narcotics and cash. The warrant affidavit contained the name of a confidential informant who provided the information supporting the warrant. Gelber signed the warrant and ordered that the affidavit remain sealed to protect the name of the informant.

seized jewelry and money as payment for granting the motion. Shenberg responded stating that he did not believe that the request would raise any "red flags."

On March 20, 1990, Gelber conducted a hearing on Takiff's motion to return property and to unseal the affidavit. Gelber deferred ruling on the motion until March 22, 1990, and ordered the prosecutor to provide him with a copy of the sealed affidavit for *in camera* review. The following day, after Gelber had made a photocopy of the affidavit, he met with Takiff intending to provide Takiff with the name of the informant. Before Gelber divulged the name, Takiff informed Gelber that Peter intended to kill the informant. After learning of the murder plot, Gelber refused to disclose to Takiff the name of the informant. The next morning, Gelber ruled on the motion to return property ordering that the state return the seized jewelry to the defendant, that the state file a forfeiture action within ten days or return the seized cash, and that the warrant affidavit remain under seal to protect the informant's identity. Later that evening, Gelber met with Shenberg to inform him that Peter intended to kill the informant. Shenberg responded to this news stating, "I don't know what the big deal is. He's just a drug dealer." Subsequently, Shenberg decided to disclose the informant's name to Takiff, and on March 24, 1990, Shenberg met with Takiff for the first time. Shenberg, identifying himself as Gelber's best friend, stated that he had the information Takiff requested from Gelber. Shenberg then told Takiff that he had the information Takiff requested from Gelber. Shenberg then told Takiff that he would provide him with the name of the

informant upon three conditions: (1) that Peter not murder the informant for forty-five days; (2) that Peter pay Shenberg $50,000; and (3) that Gelber receive a portion of the seized money and jewelry. Takiff agreed to Shenberg's terms, and Shenberg provided him with the name of the informant and facts contained in the affidavit.[4] In return, Takiff gave Shenberg $25,000 on April 2, 1990, as a partial payment for the informant's name and paid the remaining $25,000 on May 15, 1990. On May 16, 1990, Takiff gave Gelber $20,000 for his share of the seized money and property. Due to the success of the transaction, Shenberg and Gelber agreed that Takiff would deal directly with Shenberg in the future.

On July 5, 1990, Takiff telephoned Shenberg at his home requesting that Shenberg expedite a bond hearing for another one of Peter's employees. While on the Telephone, Takiff stated that he had $10,000 to $12,000 available and that "the level of gratitude will at least be equal to that shown in the past." Shenberg told Takiff that he was unable to assist him but consented to meet with Takiff the next day. At their meeting the following morning, Shenberg angrily stated,

> thanks to the phone call, we're dead meat. I mean, we're never going to be able to do anything again. . . I'm never going to talk on the phone with someone who talks that

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[4] Shenberg told Takiff that the name of the informant was "Dionesio Jose Gajera." The actual name contained in the affidavit was "Dionesio Jose Guerajo."

> way . . . if you would have heard the conversation, God forbid it was recorded, it was the worse conversation that I ever, ever heard.

Shenberg met with Gelber later that morning and discussed the possibility that Takiff was an informant. Although Gelber did not believe Takiff was an informant and tried to alleviate Shenberg's concern, Shenberg told Gelber that Shenberg would not resume his dealings with Takiff.

In September 1990, Takiff approached Circuit Judge Phillip Davis seeking his assistance with case-fixing. David told Takiff that he, Gelber, and Shenberg intended to join up with him, stating that "we want to make some money, man." The following week, Takiff gave Davis a list of four names and asked Davis to determine whether these persons had any outstanding warrants against them. Davis provided the information. After learning that two of the persons had outstanding warrants, Takiff asked Gelber to fix the outstanding warrants against them. Gelber informed Takiff that he could only fix the warrant for the individual's case assigned to Circuit Judge Arthur Snyder. Following this discussion, Gelber conferred with Shenberg to discuss the possibility of influencing the case pending before Snyder. Shenberg, still expressing distrust for Takiff, stated that he believed Sepe should approach Snyder. Sepe agreed to approach Snyder on Takiff's behalf. Sepe, however, later informed Gelber that Snyder would not agree to fax the warrant. Consequently, Gelber reported to Takiff that he could not assist him on this matter.

In December 1990, the government assigned two fictitious drug trafficking cases to Sepe's criminal docket. A short time later, Takiff informed Gelber that outstanding warrants existed against Peter's sister-in-law, Bonnie Carrillo, and her husband, Hector Penna. Takiff also informed Gelber that Peter wished to obtain low bail on Carrillo and the dismissal of the charges against her through a motion to suppress the evidence. Gelber conferred with Shenberg and discussed his conversation with Takiff. Again, Shenberg stated that he had bad feelings about Takiff feelings about Takiff and cautioned Gelber about dealing with Takiff. Gelber then attended a meeting with Sepe. At this meeting, Sepe stated he had no problem with complying with Takiff's request. Following this meeting, Gelber met with Takiff requesting $325,000 in advance. Takiff complained about Gelber's terms and inquired whether the $325,000 figure included the dismissal of the charges against both Carrillo and Penna. Sepe and Gelber subsequently agreed that they would fix the cases for $200,000 for each person. On December 19, 1990, Gelber told Takiff that Sepe wanted the transaction completed on that day or not at all. Takiff failed to comply with the deadline, and Sepe cancelled the deal.

On December 28, 1990, Gelber again approached Sepe about the Carrillo case, informing him that Takiff could now proceed with the transaction. Sepe agreed to resume the negotiations with Takiff on the condition that David Goodhart, a lawyer, receive the bribery payment from Takiff. Goodhart agreed to act as "bag man" in return for $25,000 of Gelber's share of the bribery payment. Thereafter, Takiff conducted all future dealings

with Goodhart. Takiff first met with Goodhart on January 8, 1991, and explained to Goodhart that the outstanding warrant against Carrillo concerned Peter most because of their relation and that Peter would pay any amount within reason to get the matter solved. Goodhart at that point wrote $150,000, $150,000 on a legal pad stating that the transaction involved "two different things." In response, Takiff asked whether Sepe could fix the case for $200,000, and Goodhart responded that he had to discuss the new terms with Sepe. The following weeks, Takiff and Goodhart had several conversations concerning the Carrillo case; finally, on February 11, 1991, during a meeting, Takiff attempted to give Goodhart $75,000 in cash agreeing to pay another $75,000 upon dismissal of Carrillo's charges. Goodhart refused to accept the money noting that Sepe expected full payment. Approximately two weeks later, Takiff gave Goodhart $150,000 in cash. The following afternoon, Takiff brought Carrillo to Sepe's courtroom so that the state could arrest her. Sepe, over the state's objection, released Carrillo on $50,000 bail.

Takiff subsequently filed a motion to suppress the cocaine that had been seized. On April 2, 1991, Sepe conducted an evidentiary hearing and granted Carrillo's motion to suppress. The next day, Takiff gave Goodhart a proposed order suppressing the evidence in the Carrillo case. After reviewing the order, Goodhart discussed the Penna case. Both Takiff and Goodhart concluded that Penna, unlike Carrillo, did not have standing to contest the legality of the seizure. Consequently, they agreed to find alternative grounds to dismiss the charges against Penna. A few weeks later,

Sepe gave Gelber a folder containing $50,000 in cash stating that "these are the papers that you've been waiting for." Gelber then gave $10,000 to Shenberg to place in Shenberg's safe admitting that he obtained the money from fixing Carrillo's case.

On May 2, 1991, Takiff discussed with Goodhart a case pending before Circuit Judge Ellen Morphonios stating that Peter also wished to secure the release and the dismissal of that case. Goodhart, believing that Judge Morphonios would fax the case for $75,000, approached Morphonios on Takiff's behalf. On May 14, 1991, Goodhart met with Takiff and told him that Morphonios refused to fix the case. The state, on June 3, 1991, dismissed the case against Carrillo because it lacked sufficient evidence to prosecute. The next day, Goodhart told Takiff to surrender Penna in Sepe's courtroom during the week of June 19. On June 8, 1991, the government ended "Operation Court Broom" and executed search warrants at the homes and offices of Gelber, Shenberg, Sepe, Goodhart, and Davis. During the execution of the search warrant, government agents seized monies matching the serial numbers of Takiff's April 2, 1990 and February 26, 1991 bribery payments to Gelber, Sepe, Shenberg and Goodhart. Shortly after the seizure, Gelber agreed to cooperate with the government in its investigation of corruption in the Dade County Circuit Court.

PROCEDURAL HISTORY

On May 27, 1992, a grand jury in the Southern District of Florida returned a 106-count superseding indictment against

Shenberg, Goodhart, Sepe, Davis, and five other defendants. Count 1 charged all of them with conspiring to violate the Racketeer Influenced and Corrupt Organization Act (RICO) in violation of 18 U.S.C. § 1962(d); Count 2 charged Shenberg, Goodhart, Sepe, Davis, and one codefendant with violation of RICO provisions 18 U.S.C. §§ 1962(c) and 1963(a).[5] The indictment also charged Shenberg with attempted extortion, in violation of 18 U.S.C. §§ 1951 and 2 (Counts 87, 90, 97, 98); conspiracy to commit extortion, in violation of 18 U.S.C. § 1951 (Count 92); and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (a)(1)(b)(i) (Counts 88 and 91. The indictment charged Goodhart with attempted extortion, in violation of 18 U.S.C. §§ 1951 and 2 (Counts 97, 104, and 106); conspiracy to commit extortion, in violation of 18 U.S.C. § 1951 (Count 103); and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(1) (Counts 98 through 100). The indictment charged Sepe with conspiracy to commit extortion, in violation of 18 U.S.C. § 1351, (Counts 95 and 103); attempted extortion, in violation of 18 U.S.C. §§ 1951 and 2 (Counts 3, 4, 89, 96, 97, and 104); mail fraud, in violation of 18 U.S.C. §§1341, 1346, and 2 (counts 61 through 80); and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (a)(1)(B)(i) (Counts 98 and 100 through 102).

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[5] The grand jury also indicted Arthur Massey, William Castro, Arthur Luongo, Harry Boehme, and Nancy Lechtner. Gelber, an unindicted co-conspirator, pleaded guilty to RICO conspiracy and testified for the government against Shenberg, Goodhart, Sepe, Davis and the other codefendants.

On May 13, 1993, the district court severed the trial of Shenberg, Goodhart, Sepe, and Davis from the trial of the remaining defendants. On September 21, 1992, the trial commenced. Approximately fifteen weeks into the trail a juror discovered a cocaine-laced baggie in the jury room bathroom. The district court did not inform the parties of the juror's discovery or conduct a hearing at that time. At the close of the evidence, the defense requested a special verdict on Counts 1 and 2 requiring the jury to identify which predicate acts each defendant committed. The district court required a special verdict on Count 2; however, it denied their request with respect to Count 1. The defense also requested the district court to replace a pregnant juror prior to jury deliberations. The district court also denied this request.

The jury began deliberating on March 11, 1993. On April 15, 1993, the pregnant juror went into labor causing the district court to stay deliberations until April 26. On April 26, the district court dismissed the pregnant juror for cause because her physician would not authorize her return on that date. Then, the district court instructed the remaining eleven jurors to continue deliberations. Later that day, the jury returned the following verdicts: Shenberg - guilty of Counts 1 and 90, not guilty of Counts 87, 88, 97, 98 and the jury could not reach a verdict on Counts 2, 91 and 92; Goodhart - guilty on Count 1, not guilty on Count 99, and the jury could not reach a verdict as to Counts 2, 97, 98, 103, and 104; Sepe - not guilty on Counts 4, 61 through 80, 89, 95 through 98, 101, and the jury could not reach a verdict on Counts 1 through 3, 103 and 104. The jury acquitted Davis on all counts.

On May 6, 1993, the district court conducted an evidentiary hearing on the discovery of the cocaine-laced baggie in the jury room. Following the evidentiary hearing, Shenberg and Goodhart filed motions for new trial. On May 24, 1993, Shenberg, Goodhart, and Sepe filed motions for acquittal. They also filed a motion to bar the government from using acquitted counts as predicate acts in Counts 1 and 2. On July 14, 1993, the district court denied Shenberg and Goodhart's motions for new trial. The court granted the motion for judgment of acquittal in part, and denied it in part, dismissing Count 104 against Goodhart and Sepe. On July 15, 1993, the district court granted motions to bar reprosecution on acquitted counts. Thereafter, the court sentenced as follows: Shenberg to 188 months imprisonment and 3 years supervised release for RICO conspiracy and extortion; Goodhart to 99 months imprisonment, 3 years supervised release, and a $100 assessment for RICO conspiracy. The government wishes to retry Shenberg and Sepe on the mistried counts. The government does not wish to retry Goodhart as to Counts 2, 97, 98 and 103. Shenberg and Goodhart appeal their convictions and sentences, and the government cross-appeals.

CONTENTIONS

Appellants Shenberg and Goodhart raise several contentions on appeal. First, appellants contend that insufficient evidence supports their RICO conspiracy convictions claiming that the government failed to prove that they agreed to personally commit or agreed to have others commit two predicate acts. Second,

appellants contend that the district court's denial of their request for a special verdict on the RICO conspiracy count denied them their Sixth Amendment right to a fair trial. Third, appellants contend that the district court abused its discretion in continuing jury deliberations with only eleven jurors after dismissing the twelfth juror for cause. Fourth, appellants contend that the juror's discovery of a cocaine-laced baggie constituted a communication, and the court erred in failing to disclose the discovery to the appellants. Finally, appellants contend that the district court improperly calculated Shenberg's sentence under the 1989 Sentencing Guidelines and Goodhart's sentence under the 1990 Sentencing Guidelines.

On cross-appeal, the government contends that the district court erroneously applied the 1989 Sentencing Guidelines in sentencing Shenberg, claiming that Shenberg's racketeering activity continued past the date that the 1990 Sentencing Guidelines took effect. The government also contends on cross-appeal that the district court erred in ruling that the doctrine of collateral estoppel bars the use of acquitted counts as predicate acts for substantive RICO and RICO conspiracy charges in a retrial of mistried counts.

ISSUES

The following issues presented are: (1) whether sufficient evidence supports appellants' convictions; (2) whether the district court acted within its discretion in denying appellants' request for a special verdict on the RICO conspiracy count; (3) whether the

district court abused its discretion in continuing jury deliberations with an eleven-member jury; (4) whether the district court erred in failing to inform appellants that a juror found a cocaine-laced baggie in the jury room; (5) whether the district court properly sentenced appellants under the Sentencing Guidelines; and (6) whether the doctrine of collateral estoppel bars the government from introducing evidence of acquitted conduct at retrial.

DISCUSSION

A. Sufficiency of the evidence

[1, 2] We review sufficiency of the evidence claims in the light most favorable to the government drawing all reasonable inferences and credibility choices made in favor of the jury's verdict. *United States v. Gilbert,* 47 F.3d, 1116, 1118 (11th Cir. 1995). If a reasonable person could find that the evidence establishes guilt beyond a reasonable doubt, the jury's verdict must stand. *United States v. Jones,* 933 F.2d 1541, 1546 (11th Cir. 1991).

Appellants contend on appeal that insufficient evidence supports their RICO conspiracy convictions arguing that the government failed to prove that appellants each either agreed to personally commit two predicate acts or agreed to have others commit two or more such acts. Shenberg asserts that his acquittal on Counts 87, 88, 97, and 98, which mirrored predicate acts 4 and 10 of the substantive RICO counts, and the jury's inability to reach

a verdict on Count 92, which mirrored predicate act 7, subjected him to liability for only one predicate act, act 6.[6] Similarly, Goodhart asserts that his acquittal on Count 99 only subjected him to liability for his actions in the Carrillo case as set forth in predicate act 10.

[3] We first note that neither the acquittal of appellants nor their codefendants on other counts alleging similar or related conduct is relevant to the issue of whether sufficient evidence supports appellants' RICO conspiracy convictions. *United States v. Church*, 955 F.2d 688, 695 (11th Cir.), *cert. denied*, 506 U.S. 881, 113 S.Ct. 233, 121 L.Ed.2d 169 (1992). These verdicts though seemingly inconsistent "could [have] easily [been] the result of mistake or lenity by the jury in acquittal as they could be proof of lack of evidence to support the conviction." *Church*, 955 F.2d at 695. For this reason, we insulate acquittal verdicts from our review of the sufficiency of the evidence.

[4-6] To establish a RICO conspiracy violation under 18 U.S.C. § 1962(d), the government must prove that a defendant "objectively manifested, through words or actions, an agreement to participate in the conduct of the affairs of the enterprise." The government can prove the existence of a RICO conspiracy agreement in one of two ways. *United States v. Russo*, 796 F.2d 1443, 1455 (11th Cir. 1986). the government may either prove (1)

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[6] The indictment charged Shenberg with predicate acts 4, 6, 7 and 10 and charged Goodhart with acts 10, 11 and 13.

that a defendant agreed to the overall objective of the conspiracy or (2) that the defendant personally committed two predicate acts, thereby participating in a single objective conspiracy. *United States v. Starrett,* 55 F.3d, 1525, 1543 (11th Cir. 1995); *Church,* 955 F.2d at 693. In proving an agreement on an overall objective, the government can use circumstantial evidence to show "that 'each defendant must necessarily have known that the others were also conspiring to participate in the same enterprise through a pattern of racketeering activity.'" *United States v. Gonzalez,* 921 F.2d 1530, 1540 (11th Cir.) (quoting *United States v. Valera,* 845 F.2d 923, 929 (11th Cir. 1988)), *cert. denied,* 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 140 (1991). "If the government proves an agreement on an overall objective, then it is 'not necessary that the defendant agree to personally commit two predicate acts.'" *Starrett,* 55 F.3d at 1544 (quoting *Gonzalez,* 921 F.2d at 1540).

[7, 8] In this case, the government presented sufficient evidence to support the finding that appellants agreed to corruptly utilize the Dade County Circuit Court system: in other words, that the appellants agreed to the overall objective of the enterprise with the knowledge that others were also conspiring to participate through a pattern of racketeering. The following evidence supports this conclusion with respect to Shenberg's conviction: Shenberg's participating with Gelber in Gelber's acceptance of kickbacks on court appointments; Shenberg's counseling of Gelber on how to conduct illegal transactions with Takiff; Shenberg's disclosure of the confidential informant's name; and Shenberg's holding, concealing, and disbursing of the proceeds derived from court

appointments and case fixing. Similarly, the following evidence supports the finding that Goodhart agreed to the overall objective of the conspiracy: Goodhart's agreement to act as a bag man for Sepe; Goodhart's arrangement with Sepe to fix the Carrillo case for Takiff; Goodhart's agreeing to arrange and arranging with Sepe to fix the Penna case; and Goodhart's attempt to bribe Morphonios. Moreover, our review of the record convinces us that a reasonable person could conclude beyond a reasonable doubt that each appellant committed or agreed to have others commit at least two predicate acts.

[9, 10] Goodhart next challenges the sufficiency of the evidence supporting his conviction contending that his six-month involvement at the end of the conspiracy does not constitute a sufficiently continuous RICO conspiracy pattern. To sustain a RICO conspiracy conviction based upon the commission of two predicate acts, the government must show that the predicate acts are related and amount to or pose a threat of continued criminal activity. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239, 109 S.Ct. 2893, 2900-01, 106 L.Ed.2d 195 (1989). In this case, Goodhart engaged in case fixing from the time he joined the enterprise until the end of the government's undercover investigation. Based on Goodhart's active involvement in fixing the Carrillo and Penna cases and the duration of his coconspirators' previous pattern of racketeering activity, we conclude that Goodhart's six-month involvement posed a threat of continued

criminal activity sufficient to support his RICO conspiracy conviction.[7] Accordingly, we affirm the appellants' convictions.

B. Denial of special verdict on RICO conspiracy count.

[11] We review the district court's denial of request for special verdict for abuse of discretion. *United States v. Dennis,* 786 F.2d 1029, 1041 (11th Cir. 1986), *cert. denied,* 481 U.S. 1037, 107 St.Ct. 1973, 95 L.Ed.2d 814 (1987).

At trial, appellants requested the district court to require the jury to return a special verdict on the RICO conspiracy count. The district court denied appellants' motion thereby requiring the jury to return a general verdict on the RICO conspiracy. Appellants argue that the use of the general verdict violated their Sixth Amendment right to a fair trial because it permitted the jury to disagree as to which two predicate acts each appellant committed or agreed to commit.[8]

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[7] Because we conclude that sufficient evidence supports the finding that Goodhart agreed to the overall objective of the enterprise, we do not address Goodhart's argument that racketeering act 10 involving the Carrillo case and act 11 involving the Penna case are multiplicitous.

[8] As previously stated, sufficient evidence supports the finding that appellants agreed to the overall objective of the RICO conspiracy, therefore the law in this circuit does not require the jury to also find that each appellant committed two predicate acts.

[12-14] As a preliminary matter, we recognize that the district court's use of a general verdict for a multi-object conspiracy, though disfavored, does not violate defendant's Sixth Amendment rights. *Griffin v. United States,* 502 U.S. 46, 47-48, 112 S.Ct. 466, 468, 116 L.Ed.2d 371 (1991). Nor does the district court's refusal to require a special verdict provide an independent basis for reversing an otherwise valid conviction. *Dennis*, 786 F.2d at 1039. In this case, the district court properly instructed the jury on the elements of a RICO conspiracy violation stating in pertinent part:

> The term pattern of racketeering activity requires at least two acts of racketeering, sometimes called predicate offenses or racketeering acts...
>
> ...[Y]ou must unanimously agree as to which two or more racketeering acts, that is, predicate offenses, if any, the defendant allegedly agreed to commit or would be committed.
>
> It would not be sufficient if some of the jurors should find that the Defendant agreed to commit two of the racketeering acts or agreed that two such acts would be committed while the remaining jurors found that he agreed to commit two different racketeering acts or agreed that two different such acts would be committed; you must all agree upon the same two racketeering acts in order to find the Defendant guilty of Count I.

We presume that a jury follows the court's instructions. *United States v. Stone,* 9 F.3d 934, 938 (11th Cir.1993), *cert. denied* -,

---- U.S. -----, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994). Appellants presented no evidence that the jury failed to adhere to the district court's instructions. Accordingly, we hold that the district court acted within its discretion in denying appellants' request for a special verdict on the RICO conspiracy count.

C. Use of eleven-member jury

[15] Next, appellants contend that the district court abused its discretion when it failed to replace the pregnant juror after dismissing her for cause during deliberations. We review the district court's decision to continue deliberations with an eleven-member jury for abuse of discretion. *See* Fed.R.Crim.P. 23 (b).

Rule 23(b) of the Federal Rules of Criminal Procedure provides for a jury of less than twelve where "the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict." Fed.R.Crim.P. 23(b). In such cases, the remaining eleven jurors can return a valid verdict. Fed.R.Crim.P. 23(b). Prior to jury deliberations commencing, the district court decided not to dismiss a pregnant juror in her seventh month of pregnancy who wanted to continue her service on the jury and who had not experienced any difficulty during pregnancy. The jury deliberated over a month without incident until the pregnant juror went into labor on April 15.[9] After the juror went into labor, the

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[9] For the remainder of this discussion we will refer to the pregnant juror as "the juror."

court stayed jury deliberations until Monday, April 26 to allow the juror to give birth and continue jury duty. The juror's physician, however, would not authorize the juror's return for jury duty until May 13,. On April 26, the district court dismissed the juror for cause, finding that the two additional weeks would cause undue delay and instructed the remaining eleven jurors to continue deliberations.

[16] "The most substantial concern about substitution of an alternate juror after deliberations have begun is that the alternative might be coerced by jury members who might have already formulated positions or viewpoints or opinions." *United States v. Phillips*, 664 F.2d 971, 995-96 (5th Cir. Unit B 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). In spite of this concern we found such substitution proper in *Phillips*. In *Phillips*, we held that the district court properly replaced a juror with an alternate juror two days after jury deliberation commenced finding that the district court utilized sufficient safeguards to neutralize the possible prejudice to the defendants. *Phillips*, 664 F.2d at 996. The district court in *Phillips* questioned the remaining eleven jurors regarding their ability to "wipe" from their minds the previous two days of deliberations prior to placing the alternate juror on jury and directing the jury to begin "anew." *Phillips*, 664 F.2d at 991. Unlike *Phillips*, the jury int his case deliberated for a month prior to the dismissal of the juror. Because of the duration of jury deliberations in this case, we believe that a far greater risk of juror coercion existed. We also believe that the district court's ability to

implement safeguards sufficient to neutralize the potential prejudice to defendants is extremely limited under such circumstances. Accordingly, we conclude that the district court acted within its discretion in continuing deliberations with only eleven jurors and reject appellants' contention that the court erred in not replacing the juror prior to deliberations, noting that it would have been improper for the court to replace a juror for cause capable of serving.

D. Juror's discovery of cocaine-laced baggie

[17] During the middle of appellants' trial, a juror presented the court security officer with a trampled cocaine-laced baggie she found in the jury bathroom.[10] The district court, observing no indicating that any juror used drugs and noting that the discovery occurred following a five-day recess, did not disclose the discovery to the parties or question any of the jurors regarding the discovery. Appellants argue that the juror's presentation of the baggie constituted a communication to the court, and therefore, the district court's conduct violated Federal Rule of Criminal Procedure 43(a).[11]

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[10] After discovery of the baggie, the court security officer regularly performed cursory checks of the jury room and garbage for similar contraband. The court found no contraband any other time during the trial.

[11] Appellants learned of the juror's discovery from a newspaper article in the *Miami Herald.*

Rule 43(a) requires trial courts to disclose communications with jurors and provide the defendant with an opportunity to be heard prior to responding to the communication. *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 2094, 45 L.Ed.2d 1 (1975). The juror's discovery in this case, however, did not constitute a communication within the meaning of rule 43(a) because the juror presented the baggie without comment on its effects on her ability to deliberate. Even assuming that the juror's presentation of the baggie constitute's a communication, the district court's actions at most establish harmless error because the district court did not respond to the jury's communication for fear that the appearance of any suspicion concerning the integrity of any juror would not serve the interest of justice. *See United States v. Rodriguez*, 765 F.2d 1546, 1553-54 (11th Cir.1985) (no error where the court failed to answer jury's question prior to verdict). Because we conclude that the district court did not abuse its discretion, we find it unnecessary to address appellants' other arguments regarding the juror's discovery.

E. Sentencing

[18] We review the sentencing court's findings of fact for clear error and its application of those facts to the Sentencing Guidelines *de novo*. *United States v. Rojas*, 47 F.3d 1078, 1080 (11th Cir.1995).

1. Shenberg

The jury convicted Shenberg of RICO conspiracy and extortion induced under the color of official right. In sentencing Shenberg, the district court applied section 2C1.2 of the Sentencing Guidelines finding Shenberg's criminal activity most analogous with the guidelines offenses involving public officials.[12] Prior to obtaining the base offense level under the 1989 Sentencing Guidelines, the district court determined that the underlying racketeering activity of the RICO conspiracy conviction constituted two distinct criminal violations: (1) soliciting or receiving bribes and extortion under the color of official right and (2) aiding and abetting a conspiracy to commit murder.[13] Consequently, the district court classified Shenberg's RICO conspiracy and extortion conviction into the following three criminal violation groups - "conspiracy to solicit or receive bribes," "conspiracy to commit

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[12] Section 2E1.1 of the United States Sentencing Guidelines sets the base offense level of 19 for a defendant convicted of RICO conspiracy unless the offense level applicable to the underlying racketeering activity is greater. U.S.S.G. §2E1.1. Section 1B1.2(d) provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." U.S.S.G. § 1b1.2(D). This mistake, however, does not affect the calculation of Shenberg's sentence because section 2E1.1, like section 1B1.2(d), allows cross-referencing under section 2C1.1.

[13] The district court classified the underlying racketeering activity into separate violations pursuant to U.S.S.G. § 1B1.2(d).

murder," and "extortion."[14] The court subsequently assigned Shenberg a base offense level of 20 for the "conspiracy to commit murder" violation group because if carried the highest base level offense of the three groups.

In obtaining the base level offense of the "conspiracy to commit murder" violation group, the court applied section 2C1.1(c)(1), the cross referencing provision, and borrowed the applicable guidelines for a conviction for conspiracy to commit murder.[15] *See* U.S.S.G. § 2A2.1. The district court then added 4 two-point enhancements for "more than minimal planning: pursuant to section 2A2.1(b)(1), financial motivation pursuant to section 2A2.1(b)(1), financial motivation pursuant to section 2A2.1(b)(4), abuse of a position of public trust pursuant to section 3B1.1, increasing Shenberg's offense level to 28. Next, the district court added a one-point multi-count adjustment to the offense level, pursuant to section 3A1.1, increasing Shenberg's offense level of

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[14] The presentence investigation report (PSI) separately calculated Shenberg's offense level for the "conspiracy to solicit or receive bribes" and the "extortion" violation groups. Because the district court did not sentence Shenberg according to either of these calculations, we do not address Shenberg's contention that the probation officer improperly scored these violations groups under the Sentencing Guidelines.

[15] Section 2C1.1(c)(1) provides that "[i]f the bribe was for the purpose of concealing or facilitating another criminal offense," cross reference, U.S.S.G. § 2C1.1(c)(1)(1989).

29.[16] The district court, finding that the combined offense level did not adequately reflect the systematic and pervasive corruption of Dade County judiciary and loss of public confidence in government, departed upward 5 levels, from 29 to 34, pursuant to section 5K2.0. *See* U.S.S.G. § 5K2.0.

Shenberg challenges the calculation of his sentence on several grounds. First, Shenberg contends that the district court's application of the conspiracy to commit murder guideline constitutes an improper use of section 2C1.1(c)(1). Second, Shenberg contends that the district court erred in applying the vulnerable victim and "more than minimal planning" enhancement not his offense level.[17]

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[16] For purposes of U.S.S.G. § 3D1.4, the court combined the "conspiracy to commit murder" and the "extortion" violation groups and assigned it one point. The court assigned the "conspiracy to solicit or receive bribes" violation group one-half point. The combined score required an increase of one level.

[17] Shenberg also contends that the district court improperly applied a two-point enhancement for more than one bribe under 2C1.1(b)(1) and financial motivation under Section 2A2.1(b)(4). In addition, Shenberg contends that the district court improperly added a one point adjustment to his offense level for more than one "group" under section 3D1.4. After reviewing the record, we find that these arguments lack merit and therefore do not warrant discussion.

Finally, Shenberg contends that the district court failed to find sufficient aggravating circumstances to warrant a 5 level upward departure.

[19] We first address the district court's application of section 2C1.1(c)(1). Section 2C1.1(c)(1) authorizes the court to cross reference sentencing guidelines where "the bribe [paid] was for the purpose of concealing or facilitating another criminal offense." U.S.S.G. § 2c1.1(C)(1) (1989). The district court, adopting the factual findings in the PSI, found that Shenberg disclosed the confidential informant's name for payment with the knowledge that Peter intended to murder the informant and that Shenberg participated in the planning of the murder in requiring that murder not occur for at least forty-five days.[18] Based on this finding the district utilized section 2C1.1(c)(1) (1989). Shenberg argues that the application of the cross referencing provision in this case impermissibly over-represents the severity of the underlying crime and "artificially" inflates the guidelines range. We disagree.

[20] According to the language in the Sentencing Guidelines, Shenberg's disclosure of the confidential informant's name is tantamount to conspiracy to commit murder because Shenberg released the name for payment with the understanding that it would facilitate the informant's murder. We give the

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[18] As set forth in the facts section of this opinion, Peter and the confidential informant are both fictitious persons the government created for purpose of its undercover sting operation.

Sentencing Guidelines their plain meaning effect, "except in the most extraordinary situation where the language leads to an absurd result contrary to clear legislative intent." *United States v. Pompey*, 17 F.3d 351, 354 (11th Cir. 1994) (citations omitted). Because no absurd result occurred in this case, we affirm the district court's application of section 2C1.1(c)(1).

[21] Next, Shenberg argues that the court improperly applied the "vulnerable victim" enhancement because the alleged murder conspiracy involved a fictitious confidential informant. Section 3A1.1 provides for a two-point enhancement "[i]f the defendant knew or should have known that a victim of the offense was unusually vulnerable. . .or otherwise particularly susceptible to criminal conduct." Shenberg urges this court to hold that the district court improperly applied the "vulnerable victim" enhancement solely because the victim in this case is a fictitious one. We cannot so hold in light of existing law in this circuit. This circuit has repeatedly recognized that the "vulnerable victim" enhancement solely because the victim in this case is a fictitious one. We cannot so hold in light of existing law in this circuit. This circuit has repeatedly recognized that the "vulnerable victim" enhancement " 'focuses chiefly on the conduct of the defendant' and should be applied only where 'the defendant selects the victim' due to the victim's perceived vulnerability to the offense." *United Stated v. Page*, 69 F.3d 482, 488 (11th Cir. 1995) (quoting *United States v. Long*, 935 F.2d 1207, 1210 (11th Cir. 1991)) (emphasis in original). "It is the perpetrator's perception, not actual vulnerability, that triggers enhancement." *United States v. Davis*,

967 F.2d 516, 523 n. 8 (11th Cir. 1992), *rev'd on other grounds*, 30 F.3d 108 (11th Cir. 1994) (government agent posing as extortion victim did not affect the "vulnerable victim" analysis because the defendant did not know of victim's affiliation with the government). Adhering to this line of reasoning, we conclude that the district court properly applied the "vulnerable victim" enhancement in this case. Shenberg knew that the state requested that the name of the informant remain under seal to protect the informant from retaliation from Peter. Shenberg also knew that Peter intended to murder the informant. Nevertheless, Shenberg disclosed the informant's name in exchange for payment. Shenberg should not derive a benefit for purposes of sentencing merely because the informant Shenberg believed Peter would murder did not exist. We therefore hold that the district court properly applied the "vulnerable victim" enhancement pursuant to section 3A1.1.

[22] The district court, however, erred in applying the two-point enhancement for "more than minimal planning." Section 2A2.1(b)(1) under the 1989 Sentencing guidelines requires an actual assault. *See U.S.S.G.* § 2A2.1(b)(1) (1989). Because an assault on a fictitious person is impossible, the "more than minimal planing" enhancement cannot apply to Shenberg's sentence.

[23] Finally, Shenberg contends that the district court improperly departed upward five levels based upon the court's finding that Shenberg's conduct was part of a systematic corruption of a governmental function causing loss of public confidence in government. When reviewing whether the district court properly

departed from the Sentencing Guidelines, we employ a three-part test. *United States v. Weaver,* 920 F.2d 1570, 1572 (11th Cir. 1991). First, we determine whether the Sentencing Commission adequately considered the particular factors the district court relied on for the basis of its departure. *United States v. Godfrey,* 22 F.3d 1048, 1053 (11th Cir. 1994). Second, assuming that the Sentencing Commission did not adequately consider the factors, we determine whether the district court's reliance on those factors furthers the objectives of the guidelines. *Godfrey,* 22 F.3d at 1053. And, finally, if those factors further the objectives of the guidelines, we determine the reasonableness of the district court's departure. *See United States v. Alpert,* 28 F.3d 1104, 1108 (11th Cir. 1994).

[24] In this case, the district court found that Shenberg's conduct caused "an undermining of the system of justice in [Dade] County and in this country." Thus, in order to satisfy the first inquiry, we apply *de novo* review and look to the language of the Sentencing Guidelines to see if the Sentencing Commission adequately considered systematic corruption. Section 2C1.1's commentary specifically states, "[w]here the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a government function, process, or office that may cause loss of public confidence in government, an upward departure *may be warranted.*" § 2C1.1, comment. (n.5) (1989) (emphasis added). This language clearly indicates that the Sentencing Commission did not adequately account for systematic corruption resulting in loss of public confidence in government. We note that commentary that interprets or explains a guideline is authoritative

unless it violates the Constitution or a federal statute or is inconsistent with or a plainly erroneous reading of the guideline. *See Stinson v. United States*, 508 U.S. 36, 41-46, 113 S. Ct. 1913, 1917-19, 123 L.Ed.2d 598 (1993).

Finding that the Sentencing Commission failed to adequately consider systematic corruption, we now determine whether the district court's reliance on the systematic corruption of the Circuit Court of Dade County furthers the objectives of the guidelines. An "[u]pward departure from the guidelines range is permitted only when *aggravating circumstances* exist that were not adequately considered by the Sentencing Commission when it developed the guidelines." *Alpert*, 28 F.3d at 1108 (citing 18 U.S.C. § 3553(b)) (emphasis added). The district court found that Shenberg's conduct caused the loss of public confidence in government in Dade County and throughout the United States. This degree of loss of public confidence clearly qualifies as an aggravating circumstance. The government, however, presented no proof of local community sentiments concerning Shenberg's conduct or proof of loss of public confidence in the government. Consequently, Shenberg argues that the departure fails this prong of the test. We disagree.

[25, 26] For purposes of the guidelines, the government must prove the facts, "used" in sentencing by a preponderance of the evidence. *See United States v. Cornog*, 945 F.2d 1504, 1514 (11th Cir. 1991). In this case, the government overwhelmingly proved systematic corruption by a preponderance of the evidence. The guidelines do not require a showing of actual

public harm. The commentary to section 2C1.1 only requires the court to find that the corruption "may" cause loss of public confidence in the government. Whether the systematic corruption of the circuit court caused actual loss of public confidence in government, of course, is not subject to reasonable dispute. Therefore, the district court can properly take judicial notice of public reaction to this case and consider it in making its decision to depart from the Sentencing Guidelines. *See* Fed.R.Evid. 201. Moreover, the government's submission requesting an upward departure from the guideline range gave Shenberg reasonable notice that the district court was contemplating an upward departure. The district court also gave Shenberg an opportunity to comment before it departed from the sentencing range. Accordingly, we do not find such judicial notice improper.

[27, 28] In the alternative, Shenberg argues the district courts's application of the 2-point enhancement for abuse of position of trust under section 3B1.3 adequately accounts for the alleged harm to the public, and therefore asserts that the departure constitutes double counting. We also reject this argument. "District courts may not enhance a sentence on the basis of the same incidents that they used to determine the base level for sentencing." *United States v. Ledesma*, 979 F.2d 816, 820 (11th Cir. 1992). The district court in this case, however, did not base its decision to depart on the same considerations that motivated its application of the abuse of position of trust enhancement. In applying the abuse of position of trust enhancement, the district court only considered Shenberg's conduct with respect to his

position as an elected official of Dade County, and not on the basis of systematic corruption.[19] Consequently, no double counting occurred in sentencing Shenberg. We therefore find that a departure based on systematic corruption and massive loss of public confidence furthers the objectives of the guidelines.

Finally, we review the district court's departure for reasonableness. The district court calculated Shenberg's total offense level at 29. The appropriate sentencing guideline range with a criminal history of category I is 87-108 months imprisonment. The district court departed from this guideline range giving Shenberg an offense level of 34 which carries a sentence range of 151-188 months. The court sentenced Shenberg to 188 months imprisonment. We find that the district court reasonably departed from the Sentencing Guidelines range. Accordingly, we affirm Shenberg's sentence on all respects, with the exception of the district court's application of the 2 point enhancement for "more than minimal planning."

2. Goodhart

The district court in sentencing Goodhart also applied the cross-referencing provision in section 2C1.1 and sentenced Goodhart as an accessory after the fact to drug trafficking under

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[19] Section 3B1.3 provides, "[i]f the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or the concealment of the offense, increase by 2 levels." U.S.S.G. § 3B1.3

section 2X3.1 because his underlying racketeering activity involved fixing a case in which the state had allegedly seized twelve kilograms of cocaine.[20] This application of the Sentencing Guidelines resulted in an offense level of 26 instead of RICO violation base offense level of 19. The district court then added a two-point enhancement under section 3B1.3 for use of a special skill, giving Goodhart a total offense level of 28.

[29, 30] Goodhart contends that the two-point enhancement for use of special skill under section 3B1.3 constituted an improper and erroneous application of the Sentencing Guidelines.[21] Goodhart argues that his status as an attorney did not facilitate the commission of the RICO conspiracy because his duties as a "bag man" did not depend on his status as an attorney. We review sentence enhancements based on special skill for clear error. *See United States v. Malgoza,* 2F.3d 1107, 1109 (11th Cir.1993). The district court found that Goodhart, as a part of the

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[20] The district court based its sentencing determination on Goodhart's involvement with the Carrillo matter. As set forth in the facts section of this opinion, the government filed fictitious drug trafficking charges against Peter's sister-in-law Bonnie Carrillo.

[21] Goodhart also contends that the district court erred in applying section 2C1.1(c)(2) cross-referencing provision and section 2X3.1 in sentencing him as an accessory after the fact to drug trafficking because his racketeering activity involved a fictitious case. We summarily affirm the district court's use of section 2C1.1(c)(2)'s cross referencing provision for the reasons set forth in our discussion of Shenberg's sentence.

RICO conspiracy involving case-fixing, read arrest affidavits, reviewed pleadings, proposed suppression orders, and made suggestions based upon his experience and education as to the amount of bond, the booking procedure, and the possibility of an appeal of Sepe's suppression order, all in an effort to avoid raising "red flags." The record supports this finding; therefore, we find no clear error. We therefore conclude that the district court properly applied the special skill enhancement.

F. Cross appeal

1. Sentencing Shenberg under the 1989 Sentencing Guidelines

[31] On cross-appeal, the government contends that the district court improperly sentenced Shenberg under the 1989 Sentencing Guidelines and argues that the district court should resentence Shenberg under the 1990 Sentencing Guidelines. At trial the government sought to prove that Shenberg, after refusing to deal with Takiff in July 1990, continued to advise Gelber and Sepe regarding their illegal activity and continued to hold the illegal proceeds for Gelber in his possession after November 1, 1990, the effective date of the 1990 Sentencing Guidelines. At Shenberg's sentencing hearing, the district court, however, found that Shenberg's participation in the conspiracy ended in July 1990. As previously stated, we review the district court's factual findings for purposes of the Sentencing Guidelines for clear error. Because

factual support exists to justify the court's finding, we find no clear error.

2. Application of collateral estoppel in retrial of mistried counts

[32] Also on cross-appeal, the government challenges the district court's July 15, 1993 order. The district court in this order held that direct estoppel barred the government from using acquitted counts as predicate acts in the substantive RICO could during the retrial of cross-appellees Shenberg and Sepe on the mistried counts.[22] The district court also held that collateral estoppel barred the government from proving the existence of a RICO conspiracy agreement with the evidence the government used to support the acquitted counts. We review questions of law *de novo*. *United States v. Terry*, 60 F.3d 1541, 1543 (11th Cir. 1995).

a. Substantive RICO count

[33, 34] It is well settled that the Double Jeopardy Clause of the Fifth Amendment does not apply in the context of a retrial of mistried counts. *Richardson v. United States*, 468 U.S.

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[22] Since the filing of this cross-appeal, the government has moved to dismiss its appeal against Goodhart and Shenberg on this issue. We previously granted the motion to dismiss with respect to Goodhart and carried the motion with the case as to Shenberg. In light of our decision today, we deny the motion to dismiss the cross-appeal against Shenberg as moot.

317, 323, 104 S.Ct. 3081, 3084-85. Although double jeopardy does not bar the government from reprosecuting defendants on mistried counts, estoppel principles may nevertheless apply to preclude the government from relitigating certain issues on retrial. *See Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); *United States v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993). In criminal cases, courts generally refer to the estoppel principles as collateral estoppel. In the context of a retrial, however, the term "collateral estoppel" is a misnomer because a "retrial cannot be 'collateral' if it is a 'continuation of the first trial." *United States v. Bailin*, 977 F.2d 270, 276 (7th Cir. 1992). For this reason, the term "direct estoppel" more appropriately characterizes the application of estoppel principles in the context of a retrial. *See Bailin*, 977 F.2d at 276. Our analysis, however, remains the same, whether we refer to the application of estoppel principles as "direct" or "collateral." *Bailin*, 977 F.2d at 280 n. 15. To avoid confusion, we will therefore refer to the estoppel principles collectively as collateral estoppel for purposes of this discussion.

[35] In *Ashe*, the Court recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. *Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194. Based on this acknowledgement, the government argues that the incorporation of the collateral estoppel doctrine in Double Jeopardy Clause limits the application of collateral estoppel to circumstances where only double jeopardy applies. Although this court has not squarely

addressed this question, the Seventh Circuit in *Bailin* rejected the government's argument, stating:

> The government's argument assumes that because collateral estoppel is "embodied" in the Double Jeopardy Clause, collateral estoppel is co-extensive with the Double Jeopardy Clause's other protections. Thus, the government asks us to hold that collateral estoppel can never apply in circumstances where double jeopardy does not. Such a holding would eliminate collateral estoppel from criminal cases and overrule *Ashe*. A criminal defendant has no need for the benefits of issue preclusion if his entire prosecution, then a court need not consider whether particular issues are precluded from relitigation.

Bailin, 977 F.2d at 275. We agree with the Seventh Circuit and hold that the Double Jeopardy Clause does not limited the application of collateral estoppel to only cases in which double jeopardy applies.

[36-38] The doctrine of collateral estoppel applies "when an issue of ultimate fact has once been determined by a valid and final judgment." *Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194. In such instances, the same parties cannot relitigate the ultimate issue in any future lawsuit. *Ashe*, 397 U.S. at 443, 90 St.Ct. at 1194. When determining whether collateral estoppel applies in the context of a retrial, *Ashe* requires courts to engage in a two-part inquiry. *See Brown*, 983 F.2d at 202. First, courts must examine the verdict and the record to see "what facts," if any, were necessarily determined in the acquittal at the first trial. *Brown*, 983

F.2d at 202. Second, the court must determine whether the previously determined facts constituted "an essential element" of the mistried count. *Brown*, 983 F.2d at 202. Applying *Ashe's* two-part test, the district court correctly noted that most of the crimes Sepe and Shenberg were charged with mirrored predicate acts listed in the substantive RICO count. Based on this finding, the district court concluded that the acquitted counts necessitated the finding that the jury also decided the predicate acts which mirrored the acquitted counts in Sepe and Shenberg's favor in the first trial Consequently, the district court held that collateral estoppel precluded the government from listing these predicate acts as "essential elements" of the substantive RICO count. We find no error with the district court's application of collateral estoppel to the substantive RICO count. Accordingly, we affirm the district court's order barring the government form using acquitted counts as predicate acts in the substantive RICO count.

b. RICO conspiracy count

[39, 40] In the alternative, the government argues that even if collateral estoppel applies to bar the use of acquitted counts as predicate acts in the substantive RICO count, it does not preclude the government from introducing the evidence it offered to support the acquitted counts as predicate acts in the RICO conspiracy count. We agree. Like the substantive RICO count, the acquitted counts do not necessitate the finding that the issue of ultimate fact, i.e. agreement to commit two ore more predicate acts or agreement to the overall objective of the enterprise, was

necessarily determined. This is because the actual commission of the underlying crime does not constitute "an essential element" of RICO conspiracy. *United States v. Eley*, 968 F.2d 1143, 1146 (11th Cir. 1992).

The Supreme Court's holding in *United States v. Felix*, 508 U.S. 378, 380, 112 S.Ct. 1377, 1379-80, 118 L.Ed.2d 25 (1992), further supports this conclusion. In *Felix*, the Court allowed the government in its conspiracy prosecution to rely upon overt acts based upon substantive offenses for which the defendant had been convicted holding that the "prosecution of a defendant for conspiracy, where certain of the overt acts relied upon by the Government are based on substantive offenses for which the [issues have] been previously [decided], does not violate the Double Jeopardy Clause." *Felix*, 503 U.S. at 380, 112 S.Ct. at 1379-80. In that case, a jury in the Eastern District of Oklahoma convicted the defendant on a multi-count indictment for conspiracy, manufacture and possession with intent to distribute methamphetamine, maintaining place for manufacturing methamphetamine, and possession of precursor chemicals. Prior to that trial, a jury in the Western District of Missouri convicted the defendant on a single count of attempting to manufacture methamphetamine. On appeal, the defendant argued that the Double Jeopardy Clause barred the second prosecution because the government based its case on proof of the same conduct, actors and time frames as the prosecution in Missouri. The Tenth Circuit reversed the defendant's conviction on most of the counts holding that the Double Jeopardy Clause barred successive prosecution of

the defendant where the government based its charges on evidence introduced at the previous trial. The Court reversed the Tenth Circuit holding that "mere overlap in proof between two prosecutions does not establish a double jeopardy violation." *Felix*, 503 U.S. at 386, 112 S.Ct. at 1382. The court noted that is holding in *Felix* adhered to "the basis, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." *Felix*, 503 U.S. at 387, 112 S.Ct. at 1383.

In this case, the district court recognized that "[c]onspiracy to commit a crime is separate and distinct from the underlying crime, and [that] an acquittal as to one charge does not affect the verdict as to the other." The district court, however, erroneously concluded that the doctrine of collateral estoppel barred the government from proving a RICO conspiracy agreement with predicate acts mirroring the acquitted substantive counts. In reaching its conclusion, the district court applied this circuit's holding in *United States v. Gornto*, 792 F.2d 1028 (11th Cir. 1986). In *Gornto*, we held that in the context of a retrial the doctrine of collateral estoppel barred the government from proving mistried conspiracy counts with evidence of substantive offenses the jury acquitted the defendant of in the first trial. *Gornto*, 792 F.2d at 1031. The *Gornto* court reasoned that to hold otherwise would not provide a sufficient shield against the threat of double jeopardy. *Gornto*, 792 F.2d at 1031. Since our decision in *Gornto*, the Supreme Court has rejected this line of reasoning holding that the doctrine of collateral estoppel does not preclude the government

form introducing relevant and probative evidence that is otherwise admissible under the Federal Rules of Evidence. *See Dowling v. United States*, 493 U.S. 342, 348-49, 110 S.Ct. 668, 672-73, 107 L.Ed.2d 708 (1990).[23] Consequently, we turn our attention back to the Court's decision in *Felix*.

In the context of RICO conspiracy, the overt acts the Court speaks of in *Felix* constitute predicate acts. As the Court in *Felix* allowed the government to rely upon overt acts based upon substantive offenses for which the defendant had been previously

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[23] In *Dowling*, the district court permitted the government to introduce evidence of a prior robbery of which the defendant had been acquitted to prove identity of the bank robber in the instant case pursuant to Federal Rules of Evidence 404(b). The defendant on appeal argued that his prior acquittal precluded the government from introducing evidence which supported the charges in the acquitted case during his trial on unrelated bank robbery charges. The Supreme Court disagreed and declined to extend "the collateral estoppel component of the Double Jeopardy Clause to exclude in all circumstances. . . relevant and probative evidence that is otherwise admissible under the rules of evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Dowling*, 493 U.S. at 348, 110 S.Ct. at 672. Based on the Court's holding in *Dowling*, we conclude that *Gornto* no longer constitutes good law to the extent it holds that the doctrine of collateral estoppel bars the government from introducing the underlying evidence of acquitted substantive counts in the retrial of the mistried conspiracy count. *See United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986) holding that only intervening law from the Supreme Court or this court sitting *en banc* can overrule a prior panel decision).

convicted, it follows that we must also allow the government to rely upon the predicate acts mirroring the substantive counts the jury previously decided in the retrial of the RICO conspiracy count. Although, the Court reached its decision in *Felix* based upon the Double Jeopardy Clause and not the doctrine of collateral estoppel, the result in this case remains the same because the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. *Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194. We therefore hold that the doctrine of collateral estoppel does not bar the government from using predicate acts that mirror acquitted substantive offenses to prove RICO conspiracy.

CONCLUSION

For the foregoing reasons, we affirm Shenberg's and Goodhart's convictions and Goodhart's sentence. We, however, reverse Shenberg's sentence and remand for resentencing consistent with this opinion. The district court's order barring the government from using acquitted counts as predicate acts in the substantive RICO counts is affirmed. We otherwise reverse the portion of the district court's order barring the government from proving the RICO conspiracy and other hung counts with the evidence the government used to support the acquitted counts.

CONVICTIONS AFFIRMED AND RESENTENCING ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 93-4798

United States of America,

Plaintiff-Appellee,
Cross-Appellant,

v.

Harvey N. Shenberg,

Defendant-Appellant,
Cross-Appellee,

David Goodhart,

Defendant-Appellant.

No. 93-4906

United States of America,

Plaintiff-Appellant,

v.

Harvey N. Shenberg, Alfonso C. Sepe,

Defendants-Appellees.

On Appeal from the United States District Court

for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion_____, 11th Cir., 19___, _____F.2d_____).

Before: HATCHETT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

Filed 9/25/96

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 93-4798
D.C. Docket No. 91-708-CR

United States of America,

Plaintiff-Appellee-Cross-Appellant,

v.

Harvey N. Shenberg,

Defendant-Appellant-Cross-Appellee,

David Goodhart,

Defendant-Appellant.

No. 93-4906
D.C. Docket No. 91-708-CR

United States of America,

Plaintiff-Appellant,

v.

Harvey N. Shenberg, Alfonso C. Sepe,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

Before HATCHETT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record form the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court barring the government from using acquitted counts as predicate acts in the substantive RICO counts is hereby AFFIRMED; the portion of the District Court's order barring the government form proving the RICO conspiracy and other hung counts with the evidence the government used to support the acquitted counts is hereby reversed; the judgments of convictions of the said District Court in these causes be and the same are hereby AFFIRMED; the sentence imposed by the said District court

as to Goodhart in these causes be and the same is hereby AFFIRMED; the sentence imposed as to Shenberg in these causes be and the same is hereby REVERSED; and that these causes be and the same are hereby REMANDED to said District Court for resentencing of Shenberg in accordance with the opinion of this Court.

Entered:

July 12, 1996

For the Court: Miguel J. Cortez, Clerk

By:_____
Deputy Clerk

ISSUED AS MANDATE: 10/17/96